

Supreme Court, U. S.

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. **78-557**

BONNIE JAYNE SWOROB, DOROTHY HALL, FRED  
DRUDING, CONNIE MCHUGH and THE WHITMAN  
COUNCIL, INC.

Petitioners

v.

PATRICIA HARRIS, THOMAS MALONEY and DON  
MORROW, and RESIDENT ADVISORY BOARD.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE  
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TO: THE HONORABLE, THE CHIEF JUSTICE OF  
THE UNITED STATES, AND THE ASSOCIATE  
JUSTICES OF THE UNITED STATES SUPREME  
COURT:

The Petitioners, BONNIE JAYNE SWOROB, DOROTHY HALL, FRED DRUDING, CONNIE MCHUGH, and THE WHITMAN COUNCIL, INC., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on July 6, 1978.

#### CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania appears in the Appendix, and is unreported. There is no opinion of the Circuit Court of Appeals but its Judgment Order appears in the appendix and is unreported.

#### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

#### QUESTION PRESENTED

Where HUD Senior Officials under HUD's N.E.P.A. Regulations commence an Environmental Impact Study, find that the proposed activities constitute a severe environmental hazard, and withhold said finding from both the District Court and the Court of Appeals, did the Courts below err in refusing to order the completion of the Environmental Impact Study.

#### STATUTORY PROVISIONS INVOLVED

42 U.S.C. §4332. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations

and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,  
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes.

## STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 5 U.S.C. §701-706; 28 U.S.C. §1331 (a); and 42 U.S.C. §4332.

The petitioners are BONNIE JAYNE SWOROB, DOROTHY HALL and FRED DRUDING residents of the Whitman Urban Renewal Area (hereinafter called "URA"); CONNIE MCHUGH, a resident of the adjoining Pennsport Urban Renewal Area; and the Whitman Council, Inc. The Project Area Committee in the URA pursuant to HUD Handbook 7387.1. HALL and DRUDING are the Vice President and President respectively of the Whitman Council, Inc. MCHUGH is President of the Pennsport Civic Association. The respondents are the Secretary, Regional Director and Area Director of the United States Department of Housing and Urban Development (hereinafter called "HUD"); and the Resident Advisory Board who was granted Defendant-Intervener status by the District Court (hereinafter called "RAB").

In 1963, HUD by contract with the Redevelopment Authority of the City of Philadelphia (hereinafter called "RDA") created the URA. This contract contemplated within the URA, demolition of structures, redevelopment of replacement facilities, rehabilitation of existing dwellings through a loan and grant program, beautification of the area through the planting of trees, construction of playgrounds, development of health facilities, and other activities designed to correct the decay and blight throughout the area and to restore same to a vital, substantial

livable neighborhood. Within the URA is a plot of some six acres which HUD in its Urban Renewal Plan, designated as a public housing site and agreed to provide all monies necessary for the development of said site and retained for itself the sole and final approval authority for the development of the site.

The approximate HUD expenditures for fiscal 1970, 1971 and 1972 in the URA, respectively, were \$6,244,000, \$213,000 and \$217,000. For 1974, 1975, 1976, 1977 and 1978 there was an additional HUD funding in excess of \$2,000,000 and the same is continuing today. Pursuant to the decision in Resident Advisory Board vs. Rizzo, 425 F. 2d. 126 (3rd Cir., 1977), Cert. Den. U.S. (1978) HUD is obligated to expend an additional \$5,000,000 in the URA to build a public housing project on the site.

The federal government, acting through HUD and or its predecessors in 1969 changed the method for funding urban redevelopment from block funding, and changed the designation of the program from Urban Renewal to The Neighborhood Development Program (hereinafter called "NDP"). The Whitman Urban Renewal Area, as a result of these changes became the Whitman Neighborhood Development Program Area as did some 21 other former Urban Renewal Areas in Philadelphia.

HUD in the summer of 1973, promulgated its regulations which required HUD to perform "a special or environmental

impact study" pursuant to the National Environmental Protection Act in Whitman and all other Philadelphia NDP areas, which review shall cover past activities to the maximum extent practical, including but not limited to the public housing site included in the Whitman URA - NDP area. On August 21, 1973, HUD advised the RDA that a special environmental clearance pursuant to N.E.P.A. would be required of the URA - NDP area.

Pursuant to these HUD regulations and the HUD Order, the RDA completed and forwarded to HUD, an environmental assessment of the Whitman URA - NDP area which HUD must utilize pursuant to HUD Regulation 1390.1, in the completion of its formal N.E.P.A. Environmental Assessment.

This must describe, pursuant to HUD Regulation 1390.1, the existing environment of the entire area, to include air pollution, noise levels, and the existing social environment to include community facilities and services, employment centers and commercial facilities, character of community and others. Detailed findings must be made on how the environment, which was previously described will affect the housing project and how the housing project will affect the environment, as well as, the complete description of the quality of the environment created by the project and its impact of the expected residents or users of the project, as well as alternatives. This review did not review the public housing site for public

housing, but reviewed it for proposed alternate uses including a hockey rink or other sports facilities. During the period May 1, 1974 through April 3, 1975, HUD was actively conducting its N.E.P.A. environmental assessment of the Whitman URA-NDP area when, the Local Regional Counsel, Mr. Hall advised HUD that "since the Whitman Urban Renewal Project, A-4-28 as well as East Popular A-4-33 and West Popular A-4-31, Urban Renewal Projects are the subject of litigation in which active settlement negotiations are being undertaken. You are advised to refrain from proceeding on the environmental clearances of said projects pending further direction from this Office."

There were no settlement negotiations after February, 1976, and the environmental reviews were completed by HUD in both East and West Popular. Mr. Hall has not withdrawn his memorandum and the N.E.P.A. environmental assessment has not been completed for the Whitman Urban Renewal URA-NDP area as of this date.

On December 15, 1976, after the District Court's decision in RAB vs. Rizzo, supra. The HUD Environmental Officer, Mr. Treadwell held:

"This Office is obliged under the HUD/CEQ. Agreement for 'Catch-Up' Reviews to prepare an Environmental Assessment of the on-going Whitman NDP Renewal Area. This Office was in the process of conducting our Catch-Up Review when we were advised by Regional Counsel on April 3, 1975 to refrain

from processing the Clearance due to litigation and 'pending further direction from this (Regional Counsel) Office.'"

"In view of what is known regarding the noise characteristics in the Renewal Area (see 3. below) the 'Catch-Up' Review should probably proceed at this time in order that the results of such Assessment may be considered relative to the yet to be developed Whitman Townhouse Project."

"The Whitman Urban Renewal Area is not considered to represent a major environmental action with significant impact on the human environment. Thus, an Environmental Impact Statement (E.I.S.) is not deemed as a necessity at this time. In making this determination, we have examined the record of the District Court of the Eastern District of Pennsylvania with regard to the Residents Advisory Board, et al. vs. Frank J. Rizzo, et al. and have concluded from this record that the basis for the underlying controversy with regard to the Whitman townhouses is not based on 'environmental grounds'. However, it can be readily discerned that such environmental issues such as traffic generated noise and adequacy of community facilities will demand an assessment at the Special Clearance level."

"Based upon vehicular traffic data available from state and local resources, it appears that a significant area in the south-east section of the Whitman Urban Renewal Area - the area to be occupied in part by the Whitman Townhouses - will be subject to unacceptable noise levels. This revelation might well influence reconsideration of the intended reuse of this section of the Renewal Area and, if the determination is to proceed with new housing within the unacceptable noise zone, the development of an E.I.S. by this Department would be required and approval by the Secretary of Housing in this Zone would be required." (my emphasis)

In response to arduous cross-examination by HUD counsel before Judge Broderick on March 14, 1978, Mr. Treadwell testified:

"My Department's responsibility is to do an Environmental Assessment in the Urban Renewal Area, which is recognized as A-4-28 at Whitman. We have not yet done that Environmental Assessment. The Environmental Assessment, of course, would be done in accordance with the existing Rules and Regulations by the Department. Until we do the Assessment, we can't reach any conclusion as to whether or not the homes would be torn down or not for the sake of environmental protection. ...The noise would

affect the people who live on the Site, the housing Site."

Question: Now am I correct, Mr. Treadwell, that these noise levels are either clearly unacceptable or normally unacceptable on the entire Project Site?"

Answer: That is correct."

As late as March, 1978, the Regional Director of HUD in Philadelphia and his assistant both held an N.E.P.A. environmental assessment of the entire Whitman Area including the project site was mandatory.

Notwithstanding the above evidence, the District Court refused to Order HUD to complete its environmental assessment of the area, and dismissed petitioners' complaint. Appeal followed to the United States Court of Appeals for the Third Circuit, which on July 6, 1978 affirmed the judgment of the District Court without opinion.

#### REASONS FOR GRANTING THE WRIT

The decision herein emasculates the National Environmental Policy Act (hereinafter called N.E.P.A.), conflicts with prior decisions of this Court, and is not in accord with and cannot be reconciled with prior decisions of the various Circuit Courts of Appeal.

N.E.P.A. declares a national policy that the federal government, as

the "Trustee" for all Americans, shall use "all practical means and measures... to create and maintain conditions under which man and nature can exist in productive harmony: and "assure for all Americans, safe, healthful, productive and esthetically and culturally pleasing surroundings" without "risk to health or safety. 42 U.S.C. 4331. To implement this policy, all federal agencies, "to the fullest extent possible", shall prepare prior to acting on all "major federal actions significantly affecting the quality of the human environment, an Environmental Impact Statement." 42 U.S.C. 4332; Kleppe vs. Sierra Club, 427 U.S. 390 (1976); and Aberdeen and Rockfish Co. vs. Scrap 422 U.S. 315 (1974). We cannot think of any stronger language which could have been utilized to underscore the importance of protecting the environment. Sylva vs. Romney, 473 F. 2d. 287 (1st Cir., 1973). N.E.P.A. imposes upon all federal agencies a deliberate command to consider environmental factors and not shunt them aside in the bureaucratic shuffle. Flint Ridge Development vs. Scenic Rivers Association of Oklahoma, 426 U.S. 776 (1976). No agency shall utilize an excessively narrow construction to avoid compliance with N.E.P.A.. Latham vs. Brinegar, 506 F. 2d. 677 (9th Cir., 1977). HUD's administrative determinations in interpreting N.E.P.A. are entitled to "great weight" by a reviewing Court. Rushton Mining Co. vs. Montana, 520 F. 2d. 716 (3rd. Cir., 1975).

All HUD officials, as well as the Federal Council on Environmental Quality, at 38 Federal Register 20550 determined in 1973 that, at least, a Special Environmental Assessment of the URA, to include the public housing site, is required under N.E.P.A.. Implementing N.E.P.A. applicability, HUD commenced and still has in preparation an Environmental Assessment for the URA. However, it is currently in a "hold pattern" under opinion of Regional Counsel due to settlement negotiations. A searching analysis of N.E.P.A., the decisions of this Court, and the Circuit Courts of Appeal shows no evidence of any intention to restrict or impede its applicability when settlement negotiations are in process. The judgment of the Third Circuit, herein, approving the actions of Regional Counsel violates the precise holding of Latham vs. Brinegar, supra., that HUD shall not utilize a narrow construction of N.E.P.A. to avoid compliance therewith, as well as the mandate of Flint Ridge Development vs. Scenic Rivers Association of Oklahoma, supra., and N.E.P.A. at 42 U.S.C. 4332 that environmental factors shall not be "shunted" aside in the bureaucratic process. HUD had a mandatory duty to continue with its Environmental Assessment of the URA. Further, HUD had a duty to inform the District Court its opinion of the applicability of N.E.P.A. to the URA. After the filing of the District Court Opinion on November 8, 1976, in RAB vs. Rizzo, supra., HUD in December, 1976, determined that the noise levels on the Site were in excess of the levels under which HUD Regulation 1390.2 would bar residential

construction completely, or without a formal Environmental Statement and the Secretary's approval, at minimum. During the period November 8, 1976 through January 6, 1977, HUD did not divulge these findings to the District Court. Nor did it divulge same to the Third Circuit Court during the period from the date of its Appeal to the date of its decision in August, 1977, nor to the Court during the certiorari proceedings. HUD, in fact, did not produce this environmental data, in breach of its obligations, until March 10, 1978, some three (3) days before the commencement of trial in this matter in the District Court. It should also be noted that environmental studies which were "held up" by Regional Counsel in East and West Popular, have been completed as well as all other Philadelphia NDP areas with the exception of Whitman. The judgment of the Court of Appeals herein, places its imprimatur on the acts of HUD which have withheld from this Court, and the Courts below the facts that HUD regulations either bar residential construction in the URA or require a N.E.P.A. Environmental Impact Statement.

The First Circuit considered the applicability of N.E.P.A. to projects commenced prior to January 1, 1970 and continuing thereafter in Jones vs. Lynn, 477 F. 2d. 885 (1st Cir., 1973), holding that, "(T)he only correct interpretation would seem to be that, if the requirements of the Act can feasibly be applied - even if the project in question was begun prior to the enactment of N.E.P.A. - then they should, in fact, be applied. ...If the District Court is to properly

carry out the N.E.P.A. mandate, it must, if there reveals an expectation of substantial further federal assistance, order HUD to conduct an environmental study of the entire... program under 42 U.S.C. §4332 (2) (C) with a goal of determining what changes can still be made and, just as important, of informing the members of the community and the public what the environmental impact will be, what adverse affects cannot be avoided, and what irretrievable commitment of resources are involved when any plan is fulfilled." That Court further rejects the argument that a N.E.P.A. Statement would be futile, holding: "In the words of Chief Judge Friendly: 'Preservation of the integrity of N.E.P.A. necessitates that the (agency) be required to follow steps set forth in (Section 4332) even if it now seems likely that those steps will lead it to adhere to the present result.'"

The Tenth Circuit considered the same problem in Hart vs. Denver Urban Renewal Area, 551 F. 2d. 1178 (10th Cir., 1977), holding "that the continuing responsibility of HUD in approving specifications, estimates, and construction contracts was sufficient major federal action to require reconsideration of the plans and the filing of an E.I.S...." As long as agency decisions remain to be made or are open to revision, the Act should be applied. A continuing project is subject to N.E.P.A. 'where the cost of abandoning or altering the proposed project clearly outweighs (sic) the benefits (of) compliance.'"

Virginians for Dulles vs. Volpe, 541 F. 2d. 442 (4th Cir., 1976) and Latham vs. Brinegar, 506 F. 2d. 677 (9th Cir., 1974) hold that, as to programs in effect pre-N.E.P.A. which extend post-N.E.P.A., "It is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important that in further actions that account be taken of environmental consequences not fully evaluated at the outset of the project or program. We cannot ignore as judges what we know as citizens. The knowledge and attitudes of the public, of the Congress, and of the state and local governments about the environmental and social consequences of (public housing projects) have basically changed within the last decade...the proposed (public housing project) is to be built in the future, and decisions about it are to be governed by the law as it now reads, not as it read in 1963." Since 1/1/70, HUD has expended \$9,000,000.00 in the URA. At the present time, no housing construction has commenced. The earliest date that it could possible commence would be early, 1979, with occupancy to occur in 1980. HUD still must approve the project design, allocate funds for the construction of the contract, (estimated at \$5,000,000.00) approve the Developer's Contract, as well as the Development Plan. HUD, in this approval capacity, has the complete authority to approve, disapprove or change any and all of the contracts, plans or funds involved.

Applying the facts of Jones vs. Lynn, Hart vs. Denver, Save the Courthouse Committee

vs. Lynn and Boston Waterfront Residents' Association vs. Romney, all supra., to the facts in Whitman, they have a substantial identity. In each of these cases, HUD had obligated itself to expend funds and had approved the sites for construction of various stipulated activities, prior to January 1, 1970, but had continuing substantial involvement in spending funds, approving plans, specifications and contracts, post-January 1, 1970, on all of which it was the final approving authority with continuing authority to change, alter, approve or disapprove as the case may be. The facts are substantially similar in Whitman as discussed above. HUD expended millions of dollars in Whitman post-1970, and approved the former developer's proposals, its contracts, and obligated expenditure of in excess of Three Million Dollars (\$3,000,000.00) for the project Site itself. No construction has occurred, and HUD must, even now, approve plans, specifications, contracts, and allocate in excess of Five Million Dollars (\$5,000,000.00) for the Site. We respectfully submit that both on the facts and the law, Jones vs. Lynn, Hart vs. Denver, Save the Courthouse Committee vs. Lynn and Boston Waterfront Residents' Association vs. Romney, all supra., govern this litigation. The District Court and the judgment of the Court of Appeal herein saw fit to ignore these decisions, along with Shiffler vs. Schlesinger, 548 F. 2d. 96 (3rd. Cir., 1977) which held that to the extent HUD's involvement remains, with the opportunity to correct environmental deficiencies, N.E.P.A. applies.

The District Court and the judgment of the Third Circuit chose instead to rely upon Olivares vs. Martin, 555 F. 2d. 1192 (5th Cir., 1977); Marin City Council vs. Marin County Redevelopment Agency, 416 F. Supp. 700 (N.D. Cal., 1975); and San Francisco Tomorrow vs. Romney, 472 F. 2d. 1021 (9th Cir., 1973). Olivares was before the Circuit Court on the Plaintiff's Appeal from the District Court judgment for the Defendant on the pleadings. The Court of Appeals sustained the dismissal, holding that the Plaintiff had not even alleged in his Complaint any federal involvement post-January 1, 1970. Further, the Court of Appeals held that, since there was only inflationary spending by HUD post-January 1, 1970, there was not the requisite major action under N.E.P.A.. Olivares remains uncited by any Court except the Court below. It is distinguishable in that here there has been millions of non-inflationary dollars spent in the URA post-January 1, 1970, with substantial pleaded and proven facts showing major post-January 1, 1970 HUD involvement. The Olivares Court relied on San Francisco Tomorrow, supra.. In San Francisco Tomorrow, the Ninth Circuit held that the federal involvement was virtually complete prior to January 1, 1970, and that, despite the said virtual completion, all major federal action was terminated in 1966 when HUD funded the Urban Renewal Area. As to the second area involved, San Francisco Tomorrow held that, where there was NDP contractual funding after January 1, 1970, N.E.P.A. was applicable and ordered the Environmental Statement therein. San Francisco Tomorrow is inopposite for the same reasons as Olivares, e.g. the post-January 1, 1970 non-inflationary funding of HUD.

San Francisco Tomorrow was followed by the District Court in Jones vs. Lynn, 354 F. Supp. 443 (D.C. Mass., 1972) but was criticized and distinguished in the Jones vs. Lynn Appeal, at 477 F. 2d. 85 (1st Cir., 1973). In Chick vs. Hills, 528 F. 2d. 485 (1st Cir., 1976), the First Circuit limited San Francisco Tomorrow to situations where all HUD approvals, including contracts with developers, have been accomplished prior to January 1, 1970. The Second Circuit in Poretta vs. Dent, 484 F. 2d. 1146 (2nd Cir., 1973), distinguished San Francisco Tomorrow in holding that the approval by HUD of a loan application was "major federal action" under N.E.P.A.. Save the Courthouse Committee vs. Lynn, supra., categorically rejected the San Francisco Tomorrow position which HUD argued stating, "However, this restrictive position (HUD's) overlooks the facts that the proposed demolition is a concededly important segment of a large urban renewal plan in which the federal government is intimately involved by virtue of its funding." San Francisco Tomorrow was overruled sub silentio by the Ninth Circuit Court itself en banc in Latham vs. Brinegar, 516 F. 2d. 677, dissent at 694 (9th Cir., 1974) or at least limited to situations where final design approval occurs prior to January 1, 1970. Robinswood vs. Robinswood Community Club vs. Volpe, 506 F. 2d. 1366 (9th Cir., 1974). See also Citizens Against Destruction of N.E.P.A. vs. Lynn, 391 F. Supp. 1188 (N.D. Cal., 1975) in which the San Francisco Tomorrow decision was

held to be a mandate for preparation of an Environmental Impact Statement for every NDP year, which would require four (4) separate E.I.S.'s for the URA.

Jones vs. Lynn, supra., was approved and followed in Jones vs. D.C. Redevelopment Land Agency, 499 F. 2d. 502 (D.C., 1974), the Court holding it erroneous not to stay fully approved but not yet begun action, since the purpose of N.E.P.A. is to insure N.E.P.A. compliance before there has been irretrievable commitment of resources. Its rationale was adopted by the Third Circuit in Shiffler vs. Schlesinger, supra.. Southeast Chicago Community vs. HUD, 448 F. 2d. 1119 (7th Cir., 1975), quoted Jones vs. Lynn with approval.

We respectfully submit that the rationale of the Plaintiffs' action in Marin here. There are, in fact, no environmental claims in Marin County, but soliological. Here we have substantial environmental issues to the extent that Marin applies San Francisco Tomorrow, we submit that it is purely dicta. Marin also remains uncited except for the District Court herein.

The District Court and the judgment of the Third Circuit opt that a major amendatory action by HUD post-January 1, 1970, is the only event triggering N.E.P.A. in pre-January 1, 1970 approved Urban Renewal Areas. HUD Regulation 1390.1 is not so restrictive. It requires an Environmental Assessment, "to maximum extent practicable: for "uncompleted projects: which have never had a N.E.P.A.

Clearance. The criteria is not "major amendatory" but any "subsequent significant HUD action" which under the decisions of the 1st, 2nd, 3rd, 4th, 9th and 10th Circuits include all of the post-January 1, 1970 actions of HUD in the URA.. The "key", in the words of the Third Circuit, is that, "Therefore, as long as some environmental harm can still be ameliorated, compliance with N.E.P.A. would generally be ordered." Shiffler vs. Schlesinger, supra.

We submit that the above described conflicts within the various Circuits, when combined with the effect of this judgment, has created a quagmire in N.E.P.A., which this Court should resolve.

Laches is not a defense to suits seeking compliance with N.E.P.A., "because Plaintiffs seek vindication of Congressional policies aimed at benefiting the public generally rather than any particular individual, the public-at-large will suffer when meritorious environmental challenges are foreclosed. Moreover, the primary obligation of N.E.P.A. rests with the agency. An agency that has failed to heed the Congressional mandate, is in an awkward position to argue that tardiness should bar relief which, in any event, should have been unnecessary (citing cases). Similarly, it is appropriate to consider the extent to which the delay in filing suit may have been attributable to the agency's failure to make available information which it is required to publicize." Shiffler vs. Schlesinger, 548 F. 2d. 96 (3rd Cir., 1977). This is also the holding of the 1st, 6th, 8th and 9th Circuits, and the District Court in New York. Jones vs. Lynn, supra,;

Environmental Defense Fund vs. T.V.A., 468 F. 2d. 1164 (6th Cir., 1972); Minnesota Public Interest Research Group vs. Butts, 498 F. 2d. 1314 (8th Cir., en banc, 1974); Cady vs. Morton, 527 F. 2d. 78 (9th Cir., 1975); City of New York vs. U.S., 337 F. Supp. 150 (E.D.N.Y., 1971). The opinion of the District Court and the judgment of the Court of Appeals sustaining the laches defense conflicts with the decisions of five (5) Circuits.

RAB vs. Rizzo, is a "civil rights" action. RAB in its Brief on Appeal to the Third Circuit, in RAB vs. Rizzo, argued:

"Defendant, W.A.I.C., throughout the history of this litigation, has never asserted a claim, presented any proof or sought any relief against any party because of HUD actions in regard to N.E.P.A..

The District Court, in its opinion in RAB vs. Rizzo, did not mention N.E.P.A. and the Third Circuit held that N.E.P.A. was not raised below by present petitioners. This Court denied present petitioners' petition for certiorari on the N.E.P.A. issue.

One of these conjunctive elements of res judicata is identity of the causes of action, under the guiding principle that res judicata is a principle of public policy and should be applied so as to give rather than deny justice. Dore vs. Kleppe 522 F. 2d. 1369 (5th Cir., 1975); Wasloff vs. American Automobile Insurance Company, 451 F. 2d. 767 (5th Cir., 1971); Baltimore S.S. Company vs. Phillips, 274

U.S. 316 (1927); Rhodes vs. Myers, 334 F. 2d. 709 (5th Cir., 1964), cert. den. 379 U.S. 915 (1964).

The cause of action in RAB vs. Rizzo was the civil rights of RAB in the project site and the duties of all the government defendants to enforce same. Here, the cause of action was the right of all Americans represented by Petitioners to insist that the Federal Government perform its statutory duties under N.E.P.A. on the entire URA.

The causes of action in RAB vs. Rizzo and here are not identical under this criteria. The opinion of the District Court and the judgment of the Third Circuit are contra the decisions of this Court and the 5th Circuit and N.E.P.A.

It is indeed ironic that the District Court in RAB vs. Rizzo did not even consider N.E.P.A., and the Court of Appeals held it not properly raised, but when raised in this case, the District Court held that it was raised in RAB vs. Rizzo, and hence is barred, and the Third Circuit affirmed, without opinion.

CONNIE MCHUGH was not a named party in RAB vs. Rizzo. She did not testify in RAB vs. Rizzo. There is not evidence on this record that she had any legal notice of it nor did she have an opportunity to be heard therein. There is not testimony on this record that she authorized, let alone discussed with the Whitman Area Improvement Council, or any of its officers or directors, participating in RAB vs. Rizzo. Her own testimony is to the exact contrary that she had, absolutely, nothing

to do, at all, with RAB vs. Rizzo. She is not a member of the Whitman Area Improvement Council and never has been.

The Second conjunctive element in res judicata is identity of parties. "The threshold requirement of identity of the parties, qualified by the doctrine of privity, finds its roots in the ancient notion, now supplimented by the due process clause, that a person cannot be bound by a judgment without notice of a claim and an opportunity to be heard." Expert Electric, Inc. vs. Levine, 554 F. 2d. 1227 (2nd. Cir., 1977). Named parties, only, are bound by res judicata. Long vs. Parker, 390 F. 2d. 816 (3rd Cir., 1968); Michin vs. Rizzo, 379 F. Supp. 837 (E.D. Pa., 1974), aff'd. 511 F. 2d. 1394 (3rd Cir., 1975). One cannot be bound by a judgment upon representations by a party when the party has not been authorized to make same. Dudley vs. Myers, 422 F. 2d. 1389 (3rd Cir., 1970).

We respectfully submit that the Courts below erred as a matter of law in holding that CONNIE MCHUGH was a party in RAB vs. Rizzo, contra the prior decision of the Third and Second Circuits.

The national policy of the United States precludes the application of res judicata herein. "When the application of the judicial doctrine of res judicata would be inconsistent with the method devised by Congress, the doctrine will not be enforced by the Courts." Denver Building and Contractors' Trade Council vs. N.L.R.B., 186 F. 2d. 326 (D.C. Cir., 1950). "Section 102 of N.E.P.A. clearly instructs all federal agencies to comply with its requirements. The only time

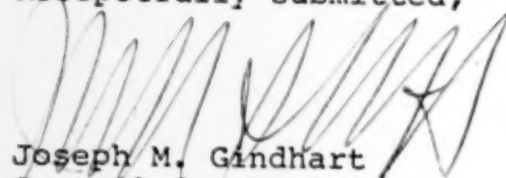
that a federal agency can avoid this inclusion is when a clear and unavoidable conflict in statutory authority exists." Concerned About Trident vs. Rumsfeld, 555 F. 2d. 817 (D.C. Cir., 1977); Realty Income Trust vs. Eckerd, 564 F. 2d. 477 (D.C. Cir., 1977). As previously discussed, the defense of laches is not applicable to HUD under N.E.P.A.. The affect of the application of res judicata herein will deprive the citizens of American to include those who live in the URA of the federally-mandated Environmental Assessment. The method devised by the Congress as sustained by the Courts is to require all federal agencies to comply with N.E.P.A.. The application of res judicata herein, is inconsistent with the method devised by Congress for the protection of the environment, namely federal trusteeship of the enviornment with its incumbent duties to perform Environmental Assessments.

There is not conflict between N.E.P.A. and the federal Civil Rights Acts nor the federal Constitution. They all have, as their objective, the rights of all Americans to live in an environmentally sound atmosphere. The question here is not whether the URA is environmentally deficient for the proposed activities therein, but whether or not these Studies should be made on the environmental conditions in the URA prior to further continuing project activities. To the extent that proposed activities would cause environmental harm in the URA, the vindication of Civil Rights in an environmentally harmful atmosphere would, destroy Civil Rights.

## CONCLUSION

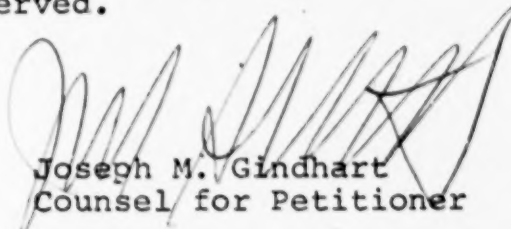
For these reasons, A Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit.

Resepctfully submitted,

  
Joseph M. Gandhart  
Counsel for Petitioners

## CERTIFICATE OF SERVICE

I hereby certify that on this day of *2nd* October, 1978, three copies of the Petition for Writ of Certiorari were hand-delivered to Harold Berk, Esquire, Sylvania House, Locust and South Juniper Streets, Philadelphia, Pennsylvania 19107, and Walter I. Batty, Jr., Esquire, 3310 U.S. Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106, Counsel for Respondents. I further certify that all parties required to be served have been served.

  
Joseph M. Gindhart  
Counsel for Petitioner

Suite 810  
1015 Chestnut Street  
Philadelphia, PA. 19107

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BONNIE JAYNE SWOROB	:	CIVIL ACTION
365 Daly Street	:	
Philadelphia, PA. 19148	:	
and	:	
DOROTHY HALL	:	
365 Daly Street	:	
Philadelphia, PA. 19148	:	
and	:	
FRED DRUDING	:	
110 Tree Street	:	
Philadelphia, PA. 19148	:	
and	:	
CONNIE McHUGH	:	
145 Hoffman Street	:	
Philadelphia, PA. 19148	:	
and	:	
THE WHITMAN COUNCIL, INC.	:	
341 Ritner Street	:	
Philadelphia, PA. 19148	:	
	:	
Plaintiffs	:	
	:	
v.	:	
	:	
PATRICIA HARRIS, Individ-	:	
ually and as Secretary	:	
of the Department of	:	
Housing and Urban	:	
Development	:	
and	:	
THOMAS MALONEY, Individ-	:	
ually and as the Regional	:	
Director of the Depart-	:	
ment of Housing and Urban	:	
Development	:	

DON MORROW, Individ- :  
 ually and as Area Director :  
 of Housing and Urban :  
 Development :  
 :  
 Defendants :  
 :  
 RESIDENT ADVISORY BOARD :  
 :  
 Defendant-Intervenor : No. 78-752  
 :

MEMORANDUM

BRODERICK, J.

April 6, 1978

This action filed on March 7, 1978 seeking to enjoin any further action in connection with the construction of 120 townhouses at Whitman Park in Philadelphia, Pennsylvania until the Department of Housing and Urban Development ("HUD") performs an assessment of the environmental impact these townhouses will have on the area. This Court previously ordered that HUD, the Redevelopment Authority of the City of Philadelphia ("RDA"), Philadelphia Housing Authority ("PHA") and the City of Philadelphia ("City") "shall immediately take all necessary steps for the construction of the Whitman Park Townhouse Project as planned." Resident Advisory Board vs. Rizzo, 425 F. Supp. 987, 1029 (E.D. Pa. 1976), aff'd in part, rev'd in part on other grounds, 546 F. 2d. 126 (3rd Cir., 1977), cert. denied, 46 U.S.L.W. 3541 (February 27, 1978) [hereinafter cited as RAB vs. Rizzo].

At a conference held in chambers on

March 7, 1978, the parties agreed that the trial of the action on the merits would be advanced and consolidated with the hearing on Plaintiffs' motion for a preliminary injunction. The consolidated trial, before the Court without a jury, commenced on March 13, 1978. The Court was immediately presented with two motions: (1) defendants' motion to dismiss, and (2) the Resident Advisory Board's motion to intervene as a party-defendant. The Court granted the Resident Advisory Board ("RAB") leave to intervene and the other motion, which had been joined by RAB, under advisement and proceeded to receive testimony in connection with the merits of plaintiffs' case. At the conclusion of plaintiffs' evidence, the defendants moved, pursuant to Fed.R.Civ.P. 41(b), for an involuntary dismissal. For the reasons hereinafter set forth, the Court has decided to grant defendants' motion, and render judgment against the plaintiffs.

Fed.R.Civ.P. 41(b) provides in pertinent part:

After the plaintiff, in an action tried by the court without a jury, had completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The Court as a trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

The granting of the defendants' motion at this stage is a decision on the merits in favor of the defendants' in rendering the judgment, the Court is not as limited in its evaluation of the plaintiffs' case as it would be on a motion for directed verdict. In ruling on a Rule 41(b) motion

(t)he court is not to make any special inferences in the plaintiff's favor nor concern itself with whether plaintiff has made out a prima facie case. Instead it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies.

9 Wright & Miller, Federal Practice and Procedure: Civil §2371 at 224-25 (1971) (footnotes omitted); 5 Moore's Federal Practice ¶41.13[4] at 41-193 to 194.

The presentation of plaintiffs' evidence having been concluded, it became apparant to the Court that judgment should be entered in defendants' favor. The legal grounds upon which the Court relies in making its determination to render judgment against the plaintiffs are: (1) res judicata; (2) laches; and (3) failure to state a claim on the merits, pursuant to a Fed.R.Civ.P. 41(b) motion.

#### I. Res Judicata

The doctrine of res judicata is intended as a bar to repetitious litigation. Cramer vs. General Telephone & Electronics, No. 76-1231 at 5 (E.D. Pa., filed August 22, 1977). Res judicata is based on the proposition that a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a

second time. Bruszewski vs. United States, 181 F. 2d. 419, 421 (3rd Cir., 1950). As the Third Circuit stated in Hubicki vs. ACF Industries, Inc., 484 F. 2d. 519, 524 (3rd Cir., 1973):

The rule provided that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim on demand, but as to any other admissible matter which might have been offered for that purpose."<sup>1</sup>

See also, Gulf Oil Corp. vs. Federal Power Commission, 563 F. 2d. 588, 602 (3rd Cir., 1977); Donegal Steel Foundry Co. vs. Accurate Products Co., 516 F. 2d. 583, 587 (3rd Cir., 1977).

The first requirement for res judicata is that the same parties or parties in privity with them were present in the prior litigation. The plaintiffs in this case were parties in RAB vs. Rizzo. In RAB vs. Rizzo, the Whitman Area Improvement Council ("WAIC") intervened as a defendant on behalf of all residents of the Whitman Urban Renewal Area and "All Other Person Acting in concert with them or otherwise participating in their aid." See WAIC's motion to intervene, filed June 30, 1971; RAB vs. Rizzo, 425 F. Supp. at 1024, n. 61. It was testified at this trial that the Whitman Council, Inc. was WAIC, having been incorporated in 1977 (Druding, N.T. 2-165). Although Connie McHugh is not a resident of the Whitman Urban Renewal Area, she testified that she lives in the adjoining community and that she has participated as an

1. Quoting Commissioner vs. Sunnen, 333 U.S. 591, 597 (1948).

active supporter of WAIC in their efforts to stop the construction of these townhouses (McHugh, N.T. 2-128, 2-129, 2-136). Therefore the first requirement as to res judicata has been satisfied.

The second requirement for res judicata is that a court of competent jurisdiction entered a final judgment on the merits. There can be no doubt that this requirement has been satisfied. RAB vs. Rizzo.

The final requirement is that this action concerns the same subject matter as the prior suit. In RAB vs. Rizzo, the defendants came forward with a variety of reasons in their attempt to justify their termination of construction of the Whitman Townhouses. One issue which WAIC raised was the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 et seq., which is the sole ground upon which they now seek to enjoin construction. One need only look at WAIC's answer to plaintiffs' corrected second amended supplemental complaint, which was filed on March 20, 1974, to discover that WAIC asserted as a defense that "[n]o environmental impact statement has been filed with regard to the project herein involved by RDA, PHA and/or HUD in violation of applicable HUD regulations hereto." (Paragraph 68). In addition, a cursory review of the notes of testimony in RAB vs. Rizzo reveals many instances of testimony in concerning NEPA, for instance:

1. Testimony of the former Whitman Urban Renewal Area project administrator concerning the filing of an environmental impact assessment or statement. (N.T. 57-111, 57-112);

2. Testimony of former WAIC president Morris Jacobs as to environmental reasons

given by a former WAIC president in 1965 objecting to public housing on the site including overcrowding, lack of recreational facilities, lack of police protection to deter crime, impact on schools, increase of social problems, increased demand for parking facilities, increase in vehicle traffic, close proximity to "potentially dangerous Liquid Carbonics plant", and destruction of concept of private homes and private homeownership in the area. (N.T. 55-101, 55-102).<sup>2</sup>

3. Morris Jacobs' testimony that there was no longer a problem from the Liquid Carbonics plant since the concern ceased its manufacturing operation for a plumbing supplies warehouse. (N.T. 55-105).

4. The following environmental concerns in connection with public housing:

(a) Filth and dirt in and around public (N.T. 54-21, 54-91, 54-103, 55-69);

(b) Violence and crime associated with public housing (N.T. 54-21, 54-91);

(c) Deterioration of the environment and the way of life in the Whitman Area if public housing is constructed (N.T. 54-109); and

(d) Deplorable conditions generally associated with public housing (N.T. 55-188).

5. Statement made in 1970 by Alice Moore,

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2. These were reasons given to change this housing from high rise, high density to low rise, single family units. (N.T. 55-102).

a former WAIC president, that, in effect, there were no environmental problems with the construction of the townhouses. She stated that the plans for the townhouses "look excellent", and that WAIC was "very impressed with the plans" which WAIC believed would make the houses "an asset to our community". RAB vs. Rizzo, 425 F. Supp. at 997-98.

6. Multiticon's plans for construction were chosen, in part, because they would not disrupt the traffic flow in the area. (N.T. 5-27).

7. The Court in making its findings in RAB vs. Rizzo, found that WAIC had not proved its allegations concerning the unsafe and unsanitary conditions which would be occasioned by the townhouse project. Id. at 1025.

WAIC did not mention its NEPA claims in its proposed findings of fact and conclusions of law submitted to this Court in RAB vs. Rizzo, nor did it raise these issues in its motion to amend this Court's findings of fact, conclusions of law and judgment filed November 15, 1976. However, before the Court of Appeals for the Third Circuit, WAIC renewed its NEPA claims as a ground for reversing this Court's findings of fact and conclusions of law. WAIC argued "that no Environmental Impact Statement has been filed respecting the project." Resident Advisory Board vs. Rizzo, 564 F. 2d. 126, 150 (3rd Cir., 1977).

Finally, in their petition for certiorari to the Supreme Court, WAIC presented the NEPA issue as the sole question for review by the Court:

### "Question Presented"

"Where the United States Department of Housing and Urban Development did not even consider environmental issues under The National Environmental Policy Act and its own regulations, yet alone file a required statement prior to approving and funding a 120 unit public housing project did the Courts below err in authorizing its construction."

Petition for Writ Certiorari of Whitman Area Improvement Council et al., at 2-3 (No. 77-759, October Term, 1977). WAIC's certiorari petition stated that not only had WAIC asserted a NEPA claim below, but also that they had "proved" that no environmental statement was ever prepared by HUD. Id. at 12.

We find, therefore, the WAIC raised this same NEPA issue in RAB vs. Rizzo, and the fact that in the present litigation the plaintiffs may have presented more evidence on the NEPA issue does not preclude the application of res judicata. As pointed out in Hubicki vs. ACF Industries, 484 F. 2d. at 524, the parties are bound as to "any other admissible matter which might have been offered...." In RAB vs. Rizzo, WAIC was given a full and fair opportunity during the 57 days of litigation before this Court to present all admissible evidence concerning their NEPA claim. Accordingly, since all three requirements for the application of res judicata have been satisfied, we hold that plaintiffs are barred from relitigating their NEPA claims.

### II. Laches

In addition to res judicata, the doctrine of laches precludes this litigation. Laches

conceptualizes the inequity which would result if a stale claim were permitted to be enforced; its application is left to the sound discretion of the trial judge. Gruca vs. United States Steel Corporation, 495 F. 2d. 1252, 1258 (3rd Cir., 1974). Laches requires two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Gardner vs. Panama Railroad Co., 342 U.S. 29, 30-31 (1951); National Ass'n of Government Employees vs. Rumsfeld, 418 F. Supp. 1302, 1304 (E.D. Pa. 1976).

We find present in this litigation the elements necessary for the application of the doctrine of laches. Townhouses were approved for Whitman site in 1967, three years after they were authorized by the Barrett Amendment. RAB vs. Rizzo, 425 F. Supp. at 996. WAIC actively participated in all phases of the proposed construction of the townhouses. Id. at 1025. In fact, WAIC was formed in the mid-1960's for the very purpose of opposing high-rise public housing at the site. Id. at 995.

The National Environmental Policy Act ("NEPA") was enacted in 1969 to become effective on January 1, 1970. If we were to overlook the fact that these same parties litigated the NEPA issue in RAB vs. Rizzo, we must then conclude that they have waited more than eight years to litigate the NEPA issue. No one has offered any justification or excuse for this delay. Moreover, this is not the situation in which the public interest in the preparation of an environmental assessment outweighs the plaintiffs' inexcusable delay and precludes application of the doctrine of laches. As hereinafter pointed out, most of the environmental problems cited by the plaintiffs in this litigation are presently existing environmental problems of the area and are not problems

which will be created by or aggravated by the construction of the townhouses. Furthermore, plaintiffs have brought to this Court's attention few, if any, environmental problems which they will suffer as a result of the construction of the townhouses.<sup>3</sup> We hold that plaintiffs have not sustained their burden in excusing their delay in initiating this action. See Gruca vs. United States Steel Corp., 495 F. 2d. 1252, 1259 (3rd Cir., 1974).

The second element necessary for the application of the doctrine of laches is that the defendant has been injured by the delay. The Government of the United States, acting through HUD, has already suffered excessive monetary losses occasioned by the previous litigation. See RAB vs. Rizzo, 425 F. Supp. at 1028. Further delays will undoubtedly mean additional monetary loss to the taxpayers.<sup>4</sup> As stated by the Court in Gruca vs. United States Steel Corp., 495 F. 2d. at 1260, "[p]ecuniary loss is a very real factor to be considered in determining whether prejudice to the defendant exists." More important than the loss of dollars and cents is the

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3. This raises a serious question as to whether plaintiffs have standing to prosecute this action. See Clinton Community Hospital Corp. vs. Southern Maryland Medical Center, 510 F. 2d. 1037, 1038 (4th Cir., 1975), cert. denied, 422 U.S. 1048 (1975) (plaintiffs who complained that they would suffer financial injury if a hospital were built did not have standing to bring a NEPA action based on their allegation that a hospital should not be constructed near a noisy airport, because the plaintiffs would not suffer from such noise.)

4. Advertisements for bids to construct these townhouses have been prepared and will soon appear in a number of publications in order to attract bidder.

irreparable injury which will be suffered by the residents of the City (defendant-intervenor) who are in desperate need of decent housing. As this Court pointed out in its memorandum of March 4, 1977:

there is an urgent need for additional decent housing for low-income families in the City of Philadelphia. Further delay in the construction of these 120 townhouses will undoubtedly injure the plaintiffs...

Resident Advisory Board vs. Rizzo, 429 F. Supp. 222, 226 (E.D. Pa. 1977). The Court finds that the plaintiffs have been guilty of laches, and are not entitled to the equitable relief which they seek in this action.

### III. The Merits of Plaintiffs' NEPA Claims

Plaintiffs contend that HUD is required, pursuant to the National Environmental Policy Act, 42 U.S.C. §4332 et seq., to perform an environmental impact study prior to the construction of the 120 townhouses at Whitman Park. NEPA has been the subject of extensive litigation since its enactment in 1969. It is well settled that it imposes on governmental agencies both procedural and substantive requirements which must be carried out prior to the commitment of Federal funds for the project. Philadelphia Council of Neighborhood Organizations vs. Coleman, 437 F. Supp. 1341, 1362 (E.D. Pa. 1977). To accomplish the environmental goals set by Congress, the Act establishes certain procedural requirements with which Federal agencies must comply. They must:

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. §4332 (2) (C). NEPA has no application, however, to any project where all major federal action was taken prior to the effective date of the Act, January 1, 1970. The issue for the Court to decide is when the last major Federal action transpired. Plaintiffs contend that substantial major Federal action in connection with the buildings of the townhouses has and will occur subsequent to the effective date of NEPA. We disagree.

As this Court found in RAB vs. Rizzo, 425 F. Supp. at 995-998:

On June 4, 1956, PHA conducted a public hearing at which various sites were considered for the development of low income housing projects. Citizens and groups from the Whitman area were in attendance at this PHA hearing, some nineteen of which testified and expressed their views on public housing. After the hearing, PHA passed a resolution selecting a site at Front and Oregon in Philadelphia for the Whitman project. Also in 1956, the Whitman site was approved as a public

housing site by the Philadelphia City Planning Commission. On February 18, 1957, HUD gave tentative approval to the Whitman site for the development of a conventional public housing project. An annual contributions contract was executed by HUD on December 6, 1957, in the amount of \$8,607,793, approving a development program for Whitman of 476 units and authorizing PHA to begin planning the Whitman project. Drawings for a high rise public housing project at the Whitman site were submitted to HUD by PHA and were approved by HUD on August 28, 1959. Condemnation and acquisition of the site by PHA took place during 1959 and 1960, culminating with the award of demolition contracts on June 26, 1960. This action had the effect of removing some of the Black families who lived on the Whitman site.

On January 12, 1961, a second public hearing was conducted by PHA for the purpose of adding two small parcels of land to the Whitman site, which addition was approved by PHA. Local opposition developed in reaction to the placing of high rise public housing in Whitman and WAIC was formed to oppose the Whitman project as planned.

On October 27, 1963, RDA executed an application to establish the Whitman Urban Renewal Area. The application sought a federal grant of \$3,311,024 and a temporary loan of \$5,545,524 (totaling \$8,856,548) to carry of the land acquisition, relocation of site residents, demolition and site clearance, site preparation, and rehabilitation or conservation required for the proposed Whitman Urban Renewal Area. The plan included clearing 130 homes, none of which were at the Whitman public housing site, and rehabilitating 2,500 structures. The Whitman Urban Renewal Plan, dated October

23, 1963, which included the previously established Whitman public housing site, contained no height limitation for public housing within the area. The land use map for the Whitman Urban Renewal Area provides for public housing as the land use for the Whitman site and is the only site in the Whitman Urban Renewal area designated for public housing. In 1963, the estimated racial composition of the Whitman Urban Renewal Area was 3,373 White families and 94 non-White families, 21 of which were to be displaced by the urban renewal. The total amount of all governmental funds expended through RDA in the Whitman Urban Renewal Area from 1963 through April 30, 1975 has been \$11,178,210.43: of this amount \$6,682,686.92 has constituted federal funds from HUD. RDA, with federal funds from HUD and from other sources, condemned and acquired a total of 101 properties and parcels of land in the Whitman Urban Renewal Area at a total estimated cost of \$1,550,075. Between 1969 and 1973, 109 new homes were privately developed and sold for between \$25,000 and \$30,000, all of which were eligible for FHA-insured mortgages. There was no opposition by WAIC to these privately developed homes. From January 1, 1966 until May 1, 1975, Whitman residents, through RDA and with the aid of federal funds, have obtained \$2,718,278 in loans and grants to rehabilitate their homes. A total of 1,123 households have received funds from this program. Over one-fourth of all the households in the Whitman area have benefited from the grant and loan program initiated by RDA. Further, urban renewal activities in the area have included a wide range of activities benefiting the Whitman area.

In 1964, after opposition by WAIC had developed to the high-rise design of the proposed Whitman project, a special Act of Congress was passed, known as the Barrett Amendment. Pursuant to the Barrett Amendment

the design of the proposed Whitman project was changed from high-rise to low-rise construction and RDA purchased the Whitman site from PHA for \$1,217,679.59 with the understanding that the land would be conveyed by RDA to a developer for construction, and finally deeded back to PHA for management by it as a low-rise public housing project. The sale of the land to RDA resulted in a writedown of the cost of the land and a change in the zoning of the Whitman site within the Urban Renewal Area to permit lowrise public housing. Such a change in the urban renewal plan was approved by City Council on September 2, 1964. In May of 1967, City Council passed an ordinance approving the purchase of the land from PHA. In late 1967, Hartsville Construction Company was chosen as a developer to build 114 units on the Whitman site. WAIC opposed certain aspects of the Hartsville plan and Hartsville refused to execute the contract of sale tendered to it on May 2, 1969. Because of the opposition by WAIC to the Hartsville plan, a decision was made to look for a new developer which would develop its own plan and not use the old Hartsville plans. Also, because the Hartsville plans were not to be used, a "turnkey" developer was obtained. A turnkey developer differed from a conventional housing developer in that the turnkey developer would purchase the land, hire the architect to design the project, produce the drawing, set a cost for his project and then submit his proposal to the Housing Authority. The Housing Authority, if it decided to accept a turnkey developer's proposal, would, after appropriate turnkey developer and HUD, which specified that the turnkey developer would build the project and upon completion turn it over to the Housing Authority for the agreed upon purchase price. The Housing Authority would manage the project and HUD would provide the necessary subsidies.

A HUD Equal Opportunity staff review of the Whitman site was conducted and approval of the site for low income public housing was recommended on June 4, 1968. The Whitman site was described as being located in a predominantly all-White area, conductive in all respects to Equal Opportunity Housing. Thereafter, HUD approved the Whitman site. The next year HUD established the Whitman project as a "balance" for the Morton Addition, a project located in a Black area of Philadelphia. The Morton Addition has been completed and is now occupied.

During the latter part of 1969, PHA and RDA advertised for turnkey developers for the Whitman site pursuant to all applicable regulations. Twelve developers responded, and on April 28, 1970, PHA chose Multicon as the developer, which choice was approved by HUD on May 20, 1970. The Multicon proposal was considered superior to all other proposals because it maintained existing street patterns and the housing was of the same design as the other houses in the Whitman area. The Whitman Park Townhouse Project was unique in design for public housing because each house was designed with street frontage and a separate entrance and could be individually plotted on a separate building lot. This design was in anticipation of a federal program called Turnkey III, which called for a lease-purchase agreement pursuant to which the public housing tenant could eventually become the owner of his own home.

On July 14, 1970, RDA and Multicon entered into an agreement of sale to enable Multicon to obtain the land at Front and Oregon and build the Whitman Park Townhouse project. On October 27, 1970, Mayor Tate signed an ordinance which had been passed by City Council approving Multicon as the developer of the

project. On October 29, 1970, based upon appropriate HUD approval of the project, PHA and Multicon entered into an agreement of sale whereby Multicon was to construct 120 townhouses on the Whitman site. On October 30, 1970, RDA conveyed title to the Whitman Park Townhouse Project site to Multicon.

Prior to the signing of the contracts with Multicon, WAIC, which was designated as the local citizen participation unit for the Whitman Urban Renewal Area, was involved in numerous meetings and correspondence with RDA, PHA and Multicon officials. On June 2, 1970, a meeting was held in the Whitman community and was attended officials from RDA, PHA, Multicon and the Mayor's office. The meeting was held to give WAIC an opportunity to closely review the Multicon plans for the Whitman Park Townhouse Project. WAIC made several suggestions in connection with the building materials to be used in the project and fire safety for the completed townhouses. The suggestions were accepted by those officials in attendance at the meeting and, after investigation, appropriate changes were made in the Whitman Park Townhouse Project plans. Also, the home ownership potential and the advantages thereof of a public housing development under Turnkey III were explained to WAIC. WAIC officials stated after the June 2, 1970 meeting that the Whitman Park Townhouse Project plans "look excellent", that WAIC was "very impressed with the plans" and that WAIC felt that the houses would be "an asset to our community."

On January 28, 1971, the president of WAIC, Alice Moore, wrote to RDA in connection with the Whitman Park Townhouse Project:

"We...do not feel that all of our questions have been thoroughly answered." On March 22, 1971, two PHA representatives attended a WAIC meeting to answer community questions about the project. At the same meeting, Fred Druding was elected as the new president of WAIC and a decision was made to demonstrate the next morning in opposition to the Whitman Park Townhouse Project.

Although a groundbreaking ceremony was conducted on December 16, 1970, actual construction did not commence until March of 1971. [citations and footnoted omitted].

The evidence in this record shows that the Whitman site was designated for housing fourteen years before the effective date of NEPA; the site was cleared of all existing properties ten years prior to NEPA; the basic design and size of the project was approved three years prior to NEPA; and the 120 townhouses will be constructed on the site occupied by houses demolished pursuant to the redevelopment plan.

The Court has found seven cases which have considered the question of whether NEPA applies to an urban redevelopment project in which most if not all Federal planning and approval was obtained prior to the effective date of NEPA: Olivares vs. Martin, 555 F. 2d. 1192 (5th Cir., 1977); Hart vs. Denver, Urban Renewal Authority, 551 F. 2d. 1178 (10th Cir., 1977); Jones vs. Lynn, 477 F. 2d. 885 (1st Cir., 1973); San Francisco Tomorrow vs. Romney, 472 F. 2d. 1021 (9th Cir., 1973); Marin City Council vs. Marin County Redevelopment Agency, 416 F. Supp. 700 (N.D. Cal., 1975); Save the Courthouse Committee vs. Lynn, 408 F. Supp. 1223 (S.D.N.Y. 1975); and Boston Waterfront Residents Ass'n vs. Romney, 343 F. Supp. 89 (D. Mass. 1972).

Olivares, San Francisco Tomorrow and Marin City Council found the requirements of NEPA inapplicable. The remaining courts reached the opposite conclusion, but in not any one of these cases holding NEPA applicable was a site cleared of existing houses, residents removed, and plans approved for the construction of houses on that very site, which houses were designed to be similar in appearance to those in the neighborhood.

Olivares arose as a consequence of attempts by the City of San Antonio to renovate its downtown area. On March 22, 1968, the Urban Renewal Agency of the City entered into a contract with HUD to enable the Agency to carry out an urban renewal project with Federal financial assistance. In 1974, the Agency offered property within the urban renewal area for bid for redevelopment in connection with the project. Bidders were to include in their bids their plans for redevelopment and/or rehabilitation and restoration of the site. In holding that the requirements of NEPA were inapplicable, the Court stated:

all the events relevant to invoking the NEPA requirements occurred before [NEPA's] passage. The contract between the Department of Housing and Urban Development and the San Antonio Development Agency was signed in 1968. It delineated a tract for urban renewal, a delineation that has not changed.

Olivares vs. Martin, 555 F. 2d. at 1197.

San Francisco Tomorrow concerned an urban redevelopment project in San Francisco with the following chronological series of events: HUD advances funds to the San Francisco Redevelopment Agency to study and

prepare plans for the proposed urban area in 1962; the redevelopment plan was submitted to HUD in 1964; it was approved by the Redevelopment Agency Commissioners in 1965; finally, in 1966, the plan was approved by the San Francisco City Planning Commission, adopted by the City of San Francisco Board of Supervisors, approved by HUD for Federal financing, and a loan and grant contract entered into between HUD and the San Francisco Redevelopment Agency. The Court held that

for purposes of NEPA, major federal action had terminated on December 2, 1966 when HUD became contractually obligated to the San Francisco Redevelopment Agency for the loan and grants

....

Appellants argue that the June 26, 1970 and April 28, 1972 amendatory grants to the San Francisco Redevelopment Agency and HUD's contractual right to monitor the project as it develops to assure compliance with statutory and contractual requirements constituted major federal actions subsequent to the passage of NEPA. We hold otherwise.

Amendatory contracts which increase the federal funding only to provide for the rising costs of land acquisition and relocation of displaced residents do not constitute "further major federal action" within the meaning of the Act. Instead, such amendments represent but confirmation of the Federal Government's earlier decision that the project proposal conformed to HUD requirements and was therefore eligible for a grant and loan.

Id. at 1025. Accord Olivares vs. Martin, 555 F. 2d. at 1197-8 n. 9.

The fact situation in Marin City Council resembles that presented to this Court. In 1958, the Marin County Redevelopment Agency ("MCRA") and the Housing and Home Finance Administration, HUD's predecessor, entered into a loan and capital grant agreement for the residential development of a 121 acre urban renewal area. Shortly thereafter, all structures in the renewal area were demolished, and partial construction begun. The developer who had initially been engaged by MCRA stopped building houses in 1967 and there was a three year hiatus during which no further construction took place. In 1970, MCRA solicited bids from other developers interested in developing the remaining portion of the area. HUD and MCRA entered into an amendatory contract to the original contract, which authorized the expenditure of additional Federal money. In connection with plaintiffs' claim that an environmetnal impact statement was necessary prior to construction, the Court held:

Since the original redevelopment plan approved in 1958 contemplated residential development of the 36 acres upon which [the development] is supposed to be built, the approval of the...amendatory contract in 1972 did not materially affect the impact of the plan on the concerns behind the Act and should not be considered major federal action under the Act.

Marin City Council vs. Marin County Redevelopment Agency, 416 F. Supp. at 706.

In reaching our determination that NEPA is not applicable, the Court has also been

guided by HUD regulations, handbooks and directives. These HUD administrative determinations are entitled to great weight by this Court. As stated by the Supreme Court in Udal vs. Tallman, 380 U.S. 792, 816 (1965):

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charges with its administration.

Accord, Columbia Broadcasting System, Inc. vs. Democratic Nat. Comm., 412 U.S. 94, 121 (1973); Lewis vs. Martin, 397 U.S. 552, 559 (1970); Rushton Mining Co. vs. Morton, 520 F. 2d. 716, 721 (3rd Cir., 1975); Bourne vs. Schlesinger, 426 F. Supp. 1026, 1029 (E.D. Pa. 1977).

The Assistant Secretary for Community Planning and Development is the HUD officer charged with primary responsibility for enforcement of NEPA. HUD Handbook 1390.1 Ch. I ¶4(a). In a letter dated June 26, 1973, the Assistant Secretary for Community Planning and Development set forth HUD's policy on environmental assessments for projects approved prior to the date of NEPA. The letter provides:

No NEPA review is required for projects in execution prior to the effective date of NEPA unless a major amendatory is proposed after January 1, 1970 for HUD approval. HUD's Draft Handbook 1390.1 (December 1972) defines a major amendatory as a significant change in the nature, magnitude or extent of the action from that which was originally

evaluated and which may have a significant effect of the quality of the human environment, such as an environmentally significant change in location or site, area covered, size or design. For purposes of urban renewal, major amendatory can be considered a major urban renewal plan amendment, i.e., (i) a significant change in a basic element of the plan, (ii) a group of minor changes in the plan which cumulatively amount to a significant change (usually an increase in size) in the area covered by the plan, or (iii) a significant change (usually an increase in size) in the area covered by the plan.

(Exhibit P-13). HUD Handbook 1390.1, concerning compliance with NEPA, in defining "major amendatory" states:

An increase or decrease in cost is considered a major amendatory only when the increase or decrease reflects such an environmentally significant change in the project.

Chapter 1, ¶2 (f).

We agree with and accept the interpretation given by the HUD regulations to the limits of the retroactive application to be given NEPA. We also agree with the reasoning of the Olivares, San Francisco Tomorrow and City of Marin County courts. We find that there has been no "major amendatory" in connection with the Whitman Park Townhouses since January 1, 1970, the effective date of NEPA, in that there have been no significant changes in the nature, magnitude or design of the townhouses. The Court further finds that there has been no environmentally

significant change in location, site, area covered, size or design of the townhouses since January 1, 1970. Accordingly, although we have found that both res judicata and laches bar this litigation, the Court nevertheless holds in the alternative that, after a consideration of the merits of plaintiffs' claims, NEPA is not applicable to this project on the basis of the Court's finding that there had been no major federal action in connection with these townhouses since January 1, 1970.

While we recognize that there may be situations where subsequent to the effective date of NEPA, serious environmental problems may be encountered which might be detrimental to the environment, the evidence in this case is completely lacking of any such environmental consequences. Plaintiffs' primary concern is a high noise level resulting from such traffic on Oregon Avenue, which is south of the Whitman site. The noise from trucks using Oregon Avenue is a situation which apparently has existed for a number of years. The construction of the townhouses certainly will not aggravate this problem. Plaintiffs also complain that the Whitman area presently suffers from congested traffic, crowded schools and poor bus service, and that the addition of the residents who will occupy the 120 townhouses will aggravate these problems. These presently existing problems, which under a broad definition may be considered environmental, are conditions which the City, the school district and SEPTA are capable of correcting. In any event, accepting the plaintiffs' claims that there are approximately 14,000 people presently residing in the Whitman area, the addition of a few

hundred people hardly can be expected to have more than a minimal impact on these presently existing problems.

As we have heretofore pointed out, the construction of these townhouses will have no environmentally significant impact on the area. The design of the proposed townhouses, single family, low rise construction, is of the same design as the houses presently existing in the Whitman area, and of the structures which were demolished from this site nearly twenty years ago. RAB vs. Rizzo, 425 F. Supp. at 1009. This construction does not alter the original character of the neighborhood. See Nucleus of Chicago Homeowners Assoc. vs. Lynn, 524 F. 2d. 225, 231 & n. 4 (7th Cir., 1975), cert. denied, 424 U.S. 967 (1976). Furthermore present construction plans were amended to overcome the objections of WAIC and its members. After the plans were completed, "WAIC officials stated... that the Whitman Park Townhouse Project plans 'look excellent', that WAIC was 'very impressed with the plans' and that WAIC felt that the houses would be 'an asset to our community.'" RAB vs. Rizzo, 425 F. Supp. at 997-998. This development has already undergone an exhaustive consideration of alternatives.

Finally, a detailed environmental assessment of this project would accomplish little. The purpose of a NEPA impact statement is to guide and advise a federal agency in its decisional process. Jones vs. Lynn, 477 F. 2d. 885, 889-90 (1st Cir., 1973). In connection with the construction of these townhouses, HUD and the defendants are required to proceed with construction as mandated by the Order of this Court which has been affirmed by the Court of Appeals, and

concerning which certiorari had been denied by the United States Supreme Court. As stated by the Court in Nucleus of Chicago Homeowners assn vs. Lynn, 524 F. 2d. 225, 232 (7th Cir., 1975), cert. denied, 424 U.S. 967 (1976):

With respect to HUD's failure to consider alternative courses of action, plaintiffs' position is equally unfounded. Plaintiffs complain that HUD did not consider that feasibility of broad-scale metropolitan planning and the provision of comprehensive social services to alleviate the problems of low-income public housing tenants. But since the scattered-housing tenants. But since the scattered-housing was court ordered, HUD and CDA [Chicago Housing Authority] have no alternative but to construct the housing. The only sense in which alternatives can be considered is in site selection and even here CHA and HUD must operate within the parameters of the Gautreaux decree.

See N.A.A.C.P. vs. Wilmington Medical Center, Inc., 436 F. Supp. 1194, 1210 (D. Del, 1977), but see Environmental Defense Fund vs. Tenn. Val. Auth., 468 F. 2d. 1164, 1177 & n. 9 (6th Cir., 1972).

Although we have pointed out that HUD and the other defendants have no alternative to the construction of the 120 townhouses as planned, this does not mean that HUD or any other defendants should refrain from taking such action as might mitigate or alleviate the presently existing problems in the Whitman area, provided such action shall in no way delay or interfere with the construction or use of the 120 townhouses.

Accordingly, this Court will enter an Order rendering judgment in favor of defendants and defendant-intervenor and against plaintiffs. This memorandum is in lieu of findings of fact and conclusions of law pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BONNIE JAYNE SWOROB	:	CIVIL ACTION
365 Daly Street	:	
Philadelphia, PA. 19148	:	
and	:	
DOROTHY HALL	:	
365 Daly Street	:	
Philadelphia, PA. 19148	:	
and	:	
FRED DRUDING	:	
110 Tree Street	:	
Philadelphia, PA. 19148	:	
and	:	
CONNIE MCHUGH	:	
145 Hoffman Street	:	
Philadelphia, PA. 19148	:	
and	:	
THE WHITMAN COUNCIL, INC.	:	
341 Ritner Street	:	
Philadelphia, PA. 19148	:	
Plaintiffs	:	
vs.	:	
PATRICIA HARRIS, Individ-	:	
ually and as Secretary	:	
of the Department of	:	
Housing and Urban	:	
Development	:	
and	:	
THOMAS MALONEY, Individ-	:	
ually and as the Region-	:	
al Director of the	:	
Department of Housing	:	
and Urban Development	:	
and	:	
DON MORROW, Individ-	:	
ually as Area Director	:	
of the Department of	:	
Housing and Urban	:	
Development	:	
Defendants	:	

RESIDENT ADVISORY BOARD :  
:   
Defendant-Intervenor : No. 78-752  
:

O R D E R

AND NOW, this 6th day of April, 1978,  
for the reasons set forth in a memorandum  
filed this date, it is hereby ORDERED that  
judgment is GRANTED in favor of defendants,  
Patricia Harris, Thomas Maloney and Don  
Morrow, and defendant-intervenor, Resident  
Advisory Board, and against plaintiffs,  
Bonnie Jayne Sworob, Dorothy Hall, Fred  
Druding, Connie McHugh and The Whitman  
Council, Inc., together with costs.

RAYMOND J. BRODERICK, J.

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

\_\_\_\_\_  
No. 78-1433  
\_\_\_\_\_

BONNIE JAYNE SWOROB, DOROTHY HALL, FRED  
DRUDING CONNIE MCHUGH, THE WHITMAN COUNCIL,  
INC.,

Appellants

vs.

PATRICIA HARRIS, Individually and as Secretary  
of the Department of Housing and Urban Develop-  
ment; THOMAS MALONEY, Individually and as the  
Regional Director of the Department of Housing  
and Urban Development, and DON MORROW, Individ-  
ually and as Area Director of the Department  
of Housing and Urban Development

\_\_\_\_\_  
APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 78-752)

\_\_\_\_\_  
Argued June 22, 1978

Before SEITZ, Chief Judge, ALDISERT AND ROSENN,  
Circuit Judges

\_\_\_\_\_  
JUDGEMENT ORDER  
\_\_\_\_\_

After consideration of all contentions  
raised by appellants, it is

ADJUDGED and ORDERED that the judgment of  
the district court be and is hereby affirmed.  
Costs taxed against appellants.

BY THE COURT,

\_\_\_\_\_  
Chief Judge

ATTEST:

\_\_\_\_\_  
Thomas F. Quinn, Clerk

Dated: July 6, 1978.

No. 78-557

Supreme Court U.S.  
FILED

DEC 18 1978

MASTERS & CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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BONNIE JAYNE SWOROB, ET AL., PETITIONERS

*v.*

PATRICIA ROBERTS HARRIS, SECRETARY OF  
HOUSING AND URBAN DEVELOPMENT, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

---

BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION

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BARBARA ALLEN BABCOCK  
*Assistant Attorney General*

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SUSAN M. CHALKER  
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*Washington, D.C. 20530*

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

---

No. 78-557

BONNIE JAYNE SWOROB, ET AL., PETITIONERS

*v.*

PATRICIA ROBERTS HARRIS, SECRETARY OF  
HOUSING AND URBAN DEVELOPMENT, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

---

BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION

---

**OPINION BELOW**

The opinion of the district court (Pet. App. 1-27) is reported at 451 F. Supp. 96. The court of appeals did not write an opinion.

**JURISDICTION**

The judgment order of the court of appeals (Pet. App. 30-31) was entered on July 6, 1978. The pe-

tition for a writ of certiorari was filed on October 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the doctrine of res judicata bars petitioners from relitigating their claim based on the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

2. Whether the doctrine of laches bars petitioners from litigating their NEPA claim.

3. Whether NEPA applies to a project as to which all major federal action was taken prior to the effective date of the Act.

### STATEMENT

This is petitioners' second petition for a writ of certiorari arising out of the same events and raising the same issue. The underlying facts are set forth in the opinion of the district court and the court of appeals in the original lawsuit, *Resident Advisory Board v. Rizzo*, 425 F. Supp. 987 (E.D. Pa. 1976), rev'd in part, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978) (hereinafter *RAB v. Rizzo*), and in the district court's opinion in this case.

1. Petitioners are the Whitman Council, Inc., three individual residents of the Whitman Urban Renewal Area in South Philadelphia, and Connie McHugh, a resident of an adjoining urban renewal area. The organizational petitioner, consisting of white residents of the Whitman Urban Renewal Area, was

formed in the early 1960s as the Whitman Area Improvement Council (WAIC) for the purpose of opposing the construction of certain federally funded low-income housing (henceforth "the Whitman project"). WAIC was incorporated as the Whitman Council, Inc. in 1977 (Pet. App. 4).<sup>1</sup>

2. In 1971 WAIC intervened as a defendant, on behalf of all residents of the Whitman Urban Renewal Area and "all other persons acting in concert with them or otherwise participating in their aid," in a civil rights action filed by RAB, an organization of low-income residents of public housing in Philadelphia and by various persons eligible for low-income public housing there. *RAB v. Rizzo*, 425 F. Supp. 987. Plaintiffs in that action alleged that defendants (the City of Philadelphia, the City's housing authority, its redevelopment authority, and HUD) had violated their rights under the Constitution and federal civil rights statutes by failing to build the planned Whitman project in a predominantly white residential area.<sup>2</sup> In its answer to plaintiffs' second amended supplemental complaint, WAIC asserted that the Whitman project could not, in any event, be built until an environmental impact statement had been filed by HUD or the appropriate City authorities (Pet. App. 5). WAIC did not, however, raise

<sup>1</sup> We will refer to the organizational petitioner as "WAIC."

<sup>2</sup> Plans to build the project became final in 1969. Construction was to begin in 1971, but, as a result of demonstrations by WAIC members that prevented workers from entering the job site, construction was halted.

this issue in its proposed findings of fact and conclusions of law. *Ibid.*

The district court in that action held that the City had acted with racially discriminatory motivation in delaying and frustrating construction of the planned project in the predominantly white Whitman neighborhood, and thereby violated plaintiffs' constitutional and statutory rights, and that the actions of the other governmental defendants, because of their discriminatory impact, violated a provision of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3608(d)(5).<sup>3</sup> The court ordered the governmental defendants to "take all necessary steps" for the construction of the project. *RAB v. Rizzo*, *supra*, 425 F. Supp. at 1029.

The court of appeals affirmed the district court's findings and order, with exceptions not here pertinent. *RAB v. Rizzo*, *supra*, 564 F.2d at 130, 150-153. In its brief on appeal WAIC had again raised the National Environmental Policy Act (NEPA) issue. The court of appeals, taking note of the fact that WAIC had failed to pursue the issue in the district court after initially raising it in its answer, declined to entertain the question. 564 F.2d at 151.

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<sup>3</sup> With regard to WAIC, the court found the evidence insufficient to prove discriminatory motivation but noted that comments by members "displayed racial bias," and that the organization's stated reasons for opposing the project lacked substance. *RAB v. Rizzo*, *supra*, 425 F. Supp. at 1024. WAIC thereafter filed a motion to amend the court's order but did not mention its environmental claims.

WAIC unsuccessfully sought review by this Court, presenting the NEPA issue as the sole question for review (77-759 Pet. 2-3) and asserting that it had raised and proved its NEPA claim below.

3. Eight days after this Court denied certiorari in *RAB v. Rizzo* (see 435 U.S. 908), petitioners filed the present suit, again asserting that the Whitman project cannot lawfully be built until HUD prepares an environmental impact statement. After petitioners completed presentation of their case in a trial to the district court, respondents below moved for an involuntary dismissal, pursuant to Fed. R. Civ. P. 41(b). The court granted the motion and entered judgment for defendants, finding petitioners' claim (1) barred by the doctrine of res judicata, (2) not entitled to consideration because of laches, and, in any event, (3) lacking in merit. The court of appeals summarily affirmed (Pet. App. 30-31).

### ARGUMENT

The courts applied settled principles to the facts of this case, and there is no reason for review by this Court.

1. Petitioners contend (Pet. 21-23) that the causes of action in question "are not identical," that there is no identity of parties, and that, accordingly, the doctrine of res judicata does not operate to bar their claim here. These contentions are erroneous.

Petitioners assert (Pet. 21-22) that *RAB v. Rizzo* was a "civil rights" action and that the present case is an action to vindicate the policies of NEPA. This

is true but irrelevant, because *petitioners'* cause of action here is identical to the one they asserted as intervening defendants and then abandoned in *RAB v. Rizzo*. Because all environmental questions could (and should) have been adjudicated in the earlier case, petitioners are precluded from raising them again here. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Jamerson v. Lennox*, 356 F.Supp. 1164 (E.D. Pa. 1972), *aff'd*, 414 U.S. 802 (1973); *Restatement of Judgments* § 1 (1942).

Petitioners' contention that there is no identity of parties is based on their assertion that petitioner Connie McHugh was not a party to the earlier suit. This assertion is contrary to the express finding of the district court (Pet. App. 4-5) that McHugh was an active supporter of WAIC in its efforts to stop construction of the townhouses in question and thus within the class represented by WAIC in the earlier suit, a class that included all residents of the Whitman Urban Renewal Area and "all other persons acting in concert with them or otherwise participating in their aid." *RAB v. Rizzo*, 564 F.2d 126.

2. The district court also properly found that petitioners are barred by the doctrine of laches from pressing the NEPA claim now (Pet. App. 8-11). Eight years elapsed from the effective date of NEPA to the filing of this suit. Petitioners have shown no justification for failing to pursue the claim earlier, particularly in view of the opportunity to do so in

*RAB v. Rizzo*; and, as the district court found (Pet. App. 10-11), the delay prejudices both the respondents and the public. The requisites for applying laches are thus established here. *Gardner v. Panama Railroad Co.*, 342 U.S. 29, 30-31 (1951); *Costello v. United States*, 365 U.S. 265, 282 (1961).

Petitioners argue (Pet. 20) that the doctrine of laches is inapplicable because they "seek vindication of Congressional policies aimed at benefiting the public generally \* \* \* [and] the public-at-large will suffer when meritorious environmental challenges are foreclosed." Whatever the merits of such a public policy argument in the abstract, it has no relationship to the facts of this case. Petitioners' environmental concerns (Pet. 24) are insubstantial and are outweighed by competing public interests. *Shiffler v. Schlesinger*, 548 F.2d 96, 103 (3d Cir. 1977). Further delay in construction of the Whitman project will irreparably injure low-income residents who are in need of decent housing. It will also thwart effectuation of the outstanding court order in *RAB v. Rizzo*, which requires "the construction of the Whitman project as planned without further interference." 564 F.2d at 150. Finally, NEPA, like other federal statutes, "demands, if it is to achieve its objective, a certain duty of attentiveness from citizens. If there were more watchfulness on the receiving end, there would be much less likelihood" of allowing environmental concerns to be neglected until too late. *Ogunquit Village Corp. v. Davis*, 553 F.2d

243, 246 (1st Cir. 1977). Petitioners are not entitled to equitable relief here.<sup>4</sup>

3. Even assuming that petitioners were entitled to a hearing on the merits of their claim, the district court correctly ruled against them. NEPA, which became effective on January 1, 1970, requires that all federal agencies file environmental impact statements whenever they propose to undertake "major \* \* \* actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Shortly after passage of the Act, the Council on Environmental Quality issued guidelines providing that, as to projects and programs begun before NEPA's effective date, such statements would be required "[t]o the maximum extent practicable" for "further major Federal actions having a significant effect on the environment." 36 Fed. Reg. 7724, 7727 (1971) (emphasis added). In keeping with this guideline, HUD requires NEPA review for previously planned projects when a significant action subsequent

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<sup>4</sup> Petitioners contend (Pet. 20-21) that the court's holding on laches conflicts with decisions of other courts of appeals. The circuits have consistently held, however, that laches is fully applicable in NEPA cases and is a question primarily addressed to the district court. See, e.g., *Shiffler v. Schlesinger*, supra, 548 F.2d at 103-104; *City of Rochester v. U.S. Postal Service*, 541 F.2d 967, 977 (2d Cir. 1976); *Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 867 (5th Cir. 1975); *Lathan v. Volpe*, 455 F.2d 1111, 1122 (9th Cir. 1971). The cases cited by petitioners to demonstrate "conflict" are distinguishable; the delays, which were substantially less than the eight years here, were held to be "reasonable" and to have resulted in no prejudice to defendants or the public.

to NEPA's effective date takes place, such as an approval of a "major amendatory." HUD Handbook 1390.1, ch. II, ¶ 5.a.(4), 38 Fed. Reg. 19185 (1973). A "major amendatory" is defined as "a significant change in the nature, magnitude or extent of the action from that which was originally evaluated and which may have a significant [e]ffect on the quality of the human environment such as an environmentally significant change in location or site, area covered, size or design." *Id.* at ch. I, ¶ 2.f., 38 Fed. Reg. 19183.

The question whether "major federal action" has occurred after 1969 is an essentially factual matter that must be decided case-by-case. See, e.g., *Olivares v. Martin*, 555 F.2d 1192, 1197 (5th Cir. 1977); *Hart v. Denver Urban Renewal Authority*, 551 F.2d 1178, 1182 (10th Cir. 1977); *Virginians for Dulles v. Volpe*, 541 F.2d 442, 446-447 (4th Cir. 1976); *Jones v. Lynn*, 477 F.2d 885, 890 (1st Cir. 1973); *San Francisco Tomorrow v. Romney*, 472 F.2d 1021, 1025 (9th Cir. 1973). There is thus no merit to petitioners' suggestion (Pet. 13-16) that the decision here is in clear conflict with decisions of other courts of appeals concerning the applicability of NEPA to other projects begun before the effective date of NEPA. Here the district court found (Pet. App. 11-26) that all major federal actions concerning construction of the Whitman project had occurred before January 1, 1970. As the court observed (Pet. App. 18):

[T]he Whitman site was designated for housing fourteen years before the effective date of

NEPA; the site was cleared of all existing properties ten years prior to NEPA; the basic design and size of the project was approved three years prior to NEPA; and the 120 townhouses will be constructed on the site occupied by houses demolished pursuant to the redevelopment plan.

The record amply supports the district court's finding on this question, and further review is unwarranted.<sup>5</sup>

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<sup>5</sup> Petitioners assert (Pet. 5-10) that in 1973 certain HUD officials began a special environmental assessment of a number of Neighborhood Development Program areas, including the area in which the Whitman project was to be built; that the assessment was suspended after the litigation in *RAB v. Rizzo* was under way; and that a HUD official testified at trial that an environmental assessment might still be in order to determine whether vehicular traffic in the Whitman area will generate unacceptable noise levels for people living on the site to be occupied in part by the Whitman townhouses. Petitioners incorrectly reason from this that an environmental impact statement is required before the Whitman townhouses can be built. The fact that HUD may have done more than is strictly required by NEPA does not, however, detract from the district court's finding, which reflects HUD's published policies, that no major federal action has been taken in connection with the Whitman project, since the effective date of NEPA. As to the potential noise problem, the district court properly noted (Pet. App. 24, 26) that the construction of 120 townhouses for low-income persons is hardly likely to be a significant contributor, and, in any event, HUD and other agencies responsible for development in the area are free to take measures to alleviate it.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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